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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

TIMOTHY J. NEWELL,
Plaintiff,
v.
COUNTY OF SAN DIEGO, ELIZABETH
PALMER AND DOES 1-100 inclusive,
Defendants.

Case No. 12cv1696-GPC (BLM)
**ORDER DENYING DEFENDANT'S
REQUEST FOR COURT ASSISTANCE
IN COORDINATING THE
DEPOSITIONS OF LISA KAHN, ASIF
KAHN, AND AMIR KAHN**
[ECF No. 27]

Currently before the Court is Defendant County of San Diego's August 8, 2013 request for assistance from the Court in coordinating the depositions of Lisa, Asif, and Amir Kahn [ECF No. 27].

FACTUAL AND PROCEDURAL BACKGROUND

On July 9, 2012, Defendants removed the instant matter to this Court from the Superior Court of the State of California. ECF No. 1. Plaintiff's complaint alleges that Defendants violated Plaintiff's civil rights. ECF No. 1-1. Specifically, Plaintiff alleges that he went to the Chula Vista branch of the San Diego Superior Court to see if there were any excess vehicles available for purchase. *Id.* at 3. When Plaintiff arrived at the court, he properly parked his car in a handicap parking space, exited his vehicle, and approached a chain link fence where he saw several Ford Crown Victoria vehicles that he thought might

1 be for sale. Id. Once at the fence, Plaintiff proceeded to take photographs of the cars.
2 Id. Plaintiff alleges that as he made his way to the garage to obtain additional information
3 about the cars, he was approached by Defendant Palmer who blocked his path and
4 inquired as to why Plaintiff was parked in a handicap space. Id. at 4. When Plaintiff
5 explained what he was doing, Defendant Palmer informed Plaintiff that she did not believe
6 him and asked him to "shut up," "sit his ass on the bumper of his" car, and not to move.
7 Id. Plaintiff alleges that this occurred after he informed Defendant Palmer that he was a
8 retired San Diego Police Officer. Id.

9 Plaintiff alleges that he complied with Defendant Palmer's orders and that she made
10 a call and additional deputies soon appeared. Id. Plaintiff next alleges that Defendant
11 Palmer opened his car door and grabbed his wallet without his consent, and that Defendant
12 Palmer would not allow Plaintiff to stand up and stretch when he began suffering from back
13 spasms. Id. Plaintiff states that Defendant Palmer searched his wallet and questioned him
14 as to who Lisa Kahn (Plaintiff's significant other) was and whether or not she was born in
15 the United States. Id. Defendant Palmer next ordered a Deputy Sheriff to conduct a pat
16 down on Plaintiff, which took place in full view of the general public, and proceeded to ask
17 Plaintiff for his social security number and where he was born. Id. Defendant Palmer then
18 allegedly told Plaintiff to stand for a photo as she continued to scroll through the pictures
19 on Plaintiff's cell phone without his consent. Id. at 4-5. Next, Defendant Palmer ordered
20 a deputy sheriff to run Plaintiff's license plate number as she searched his car. Id. at 5.
21 Defendant Palmer soon informed Plaintiff that his vehicle registration was expired, he had
22 an outstanding warrant for his arrest, and his license was suspended. Id. Plaintiff alleges
23 that Defendant Palmer then inquired if Plaintiff's license was suspended due to his failure
24 to make child support payments. Id. Defendant Palmer next had a deputy write a moving
25 violation citation against Plaintiff for driving with a suspended license. Id. Finally, Plaintiff
26 alleges that Defendant Palmer inquired as to whether or not Plaintiff had any scars or
27 tattoos, ordered Plaintiff to delete any photographs that he had taken of the cars at the
28 courthouse, and confiscated his car keys with a warning that he had twenty minutes to get

1 a ride home before his car would be towed. Id. Plaintiff was then released without being
2 charged with a crime. Id. On July 15, 2013, Plaintiff filed a motion for leave to file a first
3 amended complaint that is scheduled to be heard by Judge Curiel on October 18, 2013.
4 ECF No. 25.

5 On August 1, 2013, someone from defense counsel's office contacted chambers via
6 telephone and stated that they were seeking the Court's assistance in coordinating the
7 depositions of nonparty witnesses. On August 2, 2013, the Court issued a briefing schedule
8 requiring Defendant to file its motion on or before August 9, 2013, Plaintiff to file his
9 opposition on or before August 16, 2013, and Defendant to file its reply, if any on or before
10 August 23, 2013. ECF No. 26. Defendant filed its motion to compel on August 8, 2013.
11 ECF No. 27. Plaintiff did not file an opposition to the motion and Defendant did not file a
12 reply. See Docket.

13 **DISCUSSION**

14 Defendants request the Court's assistance in coordinating the depositions of Lisa
15 Kahn and her two sons who live with Plaintiff and who picked him up from the courthouse
16 and drove him home on the night of the incident. ECF No. 27 at 1-2. In support,
17 Defendant states that "[d]efense counsel attempted to have the Kahns served with
18 deposition subpoenas, but the numerous service attempts were unsuccessful, and Plaintiff
19 threatened physical harm to the process server." Id. Specifically, after asking the process
20 server "[w]hat the fuck do you want?," Plaintiff told the process server that Lisa was not
21 home and that he needed to "get the fuck off [Plaintiff's] property before [Plaintiff] kick[ed]
22 his ass" before pushing the process server from behind. Declaration of David Brodie at 2.
23 When the process server asked Plaintiff to refrain from touching him, Plaintiff responded
24 "[g]o ahead and call the cops, they won't care, I am a cop. And if you come back to my
25 property again I will beat your ass." Id. Defense counsel notes that he discussed the
26 incident with Plaintiff's counsel who informed him that the Kahns were hesitant to
27 participate in a deposition because they believed they would be asked about "illegal or
28 terrorism-type activities." Id. at 3. After telling Plaintiff's counsel that he would only be

1 asking questions related to the incident which is the basis of this complaint, on July 4, 2013,
2 Plaintiff's counsel stated that he would give the information to his client. Id. Since that
3 conversation, Plaintiff's counsel has not responded to defense counsel despite the fact that
4 defense counsel sent follow up emails on July 16, 2013 and July 26, 2013. In the last
5 email, defense counsel told Plaintiff's counsel that he would contact the Court for assistance
6 if he did not receive a response by July 26, 2013. Id. Defense counsel did not receive a
7 response and seeks the Court's assistance so that he may take the Kahn's depositions
8 without "risk[ing] physical harm" to anyone. Id. at 2. Plaintiff has not opposed the
9 motion. See Docket.

10 Federal Rule of Civil Procedure ("FRCP") 45 governs subpoenas issued to third
11 parties. A subpoena is required to procure testimony or documents from one who is not
12 a party to the action or controlled by a party to the action. FRCP 45. The subpoena must
13 be served by a non-party who is at least eighteen years old. FRCP 45(b)(1). Service of a
14 subpoena must be made by personally delivering a copy of the subpoena to the person
15 being served and there is no substitute service. See Prescott v. County of Stanislaus, 2012
16 WL 10617, *3 (E.D. Cal. Jan. 3, 2012) (stating that "[p]ersonal service of a deposition
17 subpoena is required by Fed.R.Civ.P. 45(b)(1)," that "[a] majority of courts interpret
18 'delivering' to require personal service," and noting that while "the Ninth Circuit has not
19 issued a published opinion on this topic, more than a decade ago, in Chima v. United States
20 Dep't of Defense, 23 Fed. Appx. 721 at *6–7 (9th Cir. Dec. 14, 2001), the Court issued an
21 unpublished decision affirming trial court's refusal to compel compliance with subpoena that
22 was served by mail") (citing San Francisco BART Dist. v. Spencer, 2006 U.S. Dist. LEXIS
23 73140 (N.D. Cal. Sept. 25, 2006); Alexander v. Cal. Dep't of Corr., 2011 U.S. Dist. LEXIS
24 34398 at *17–18 (E.D. Cal. Mar. 16, 2011) (personal service required under Rule 45(b)(1));
25 and Collagen Nutraceuticals, Inc. v. Neocell Corp., 2010 U.S. Dist. LEXIS 98228 (S.D. Cal.
26 Sept. 17, 2010) ("Rule 45 mandates personal service for subpoenas.").

27 Here, Defendants have not properly served the Kahns with deposition subpoenas so
28 the Court does not have authority to compel the depositions. Moreover, Defendants do not

1 state precisely what they are asking the Court to do, nor the legal basis for their request.
2 While the Court understands and appreciates Defendants' frustration with Plaintiff's alleged
3 conduct, Defendant fails to provide a citation to a single case, rule, or statute stating that
4 this Court has the authority to compel the depositions of non-party witnesses who have not
5 been properly subpoenaed.¹ Accordingly, despite the fact that Defendants' motion is
6 unopposed, it is **DENIED WITHOUT PREJUDICE**.

7 However, Plaintiff is warned that he may not interfere with Defendants' legitimate
8 efforts to serve deposition subpoenas on the Kahns.

9 **IT IS SO ORDERED.**

10 DATED: September 5, 2013

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12 BARBARA L. MAJOR
13 United States Magistrate Judge
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26 ¹In fact, the case law seems to indicate that the Court does not have any such authority. See Ulin v.
27 Lovell's Antique Gallery, 2010 WL 3745824, *1 (N.D.Cal. Sept. 17, 2010) (recalling that the court previously
28 "held that it had no authority to compel the deposition of a non-party witness where Plaintiff had not served
him with a deposition subpoena" when deciding Plaintiff's motion to compel a deposition); see also Prescott,
2012 WL 10617, *3 (stating that "[b]ecause the subpoena was not properly served on Dr. Pick [who was not
a party to the action], the Court lacks the authority to compel compliance with it").